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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO. 617 OF 2018
IN
EXECUTION APPLICATION NO. 1471 OF 2012

The Saraswat Coop Bank Ltd …Claimant
Versus
Mine Stone & Ors …Respondents
And
Urvashi N Mehta ...Proposed Intervenor

Ms Naira Jeejeebhoy, *with Sneha Jaisingh, & Rayan Dastur, i/b Bharucha & Partners, for Opponents Nos. 10A, 10E and 10F and Proposed Intervenor.*
Mr Bhupesh Narkar, *i/b Vishal Narkar, for the Claimant.*
Mr Yogesh Dabholkar, *Chief Manager, Saraswat Bank Ltd., is present.*

CORAM: G.S. PATEL, J
DATED: 29th March 2019

PC:-

1. The Applicant, Urvashi, is the wife of Nilesh Mehta, one of the guarantors in one of the partnership firms that was before the Arbitrator. She seeks to raise attachment of Flat No. 7 at Krishna Kunj, second floor, behind Wilson College, Mumbai. The Claimant, the Saraswat Cooperative Bank Ltd, attached this flat in execution of an Arbitral Award dated 1st December 2011. That Award was made under the Multi State Cooperative Societies Act 2002. Urvashi was not a Respondent to that Arbitration Claim. She is not a Judgment Debtor.

2. The flat belonged to Urvashi's mother-in-law, Kokila. There was a family arrangement dated 19th September 2009. Urvashi received not only this flat but also Flat No. 6 and Garage No. 10. The documents of transfer are registered and the family arrangement is also registered since it effects transfers of property. The family arrangement is of September 2009, prior to the arbitral claim and before the arbitral Award.

3. I have made separate orders today on Chamber Summons No. 765 of 2013 and Chamber Summons No. 845 of 2013. The same arguments are taken here by the Bank, and for the reasons set out in those orders, those arguments are also negatived. For completeness, these are also reproduced below.

4. The Bank says the transfers are fraudulent and voidable. Admittedly, the Bank has taken no steps whatsoever to having those transfer documents invalidated or delivered up for cancellation, and it must be borne in mind that these transfer documents are duly registered. Filing an Affidavit in Reply to a Chamber Summons will not achieve the purpose. Merely saying that a transaction is "voidable" is never enough where the transfer is effected by a registered instrument. The Bank has filed no substantive proceedings to impeach the transactions or to have the registered document delivered up for cancellation. It has made no application for an order in these terms.

5. Mr Narkar submits that the Bank need take no separate proceeding to impeach the transaction or have the document cancelled. It is enough, he says, if the Bank says so in reply to an application for raising the attachment. That is incomprehensible, for it means that the Bank can seek an order for a relief it has never sought and for which it has never made any sort of application or filed any proceeding at all.

6. In support of this proposition, Mr Narkar relies on the decision of the Supreme Court in *C Abdul Shukoor Saheb v Arji Papa Rao*.[1] There the Supreme Court was dealing with a defence taken in the written statement and mounted under Section 53 of the Transfer of Property Act. In paragraphs 29 and 31, on which Mr Narkar relies, the Supreme Court referenced Order 21 Rule 63 of the Code of Civil Procedure, 1908. Mr Narkar fails to point out that this Rule, along with Rules 60 to 62, was deleted by the 1976 amendment, with effect from 1st February 1977.[2] That amendment did away with the need to file a separate suit. It has to be read with the significant amendment to Rule 58, including Rule 58(2), which tells us that all questions, including as to any right, title or interest in any property attached must be determined by the court dealing with the claim or

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[1] AIR 1963 SC 1150.

[2] Before its deletion, Rule said: "63. *Saving of suits to establish right to attached property*.—Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

the objection *and not by a separate suit*. But this does not mean that the Bank does not need to file a *proceeding in execution* for a declaration that transaction is a fraudulent transfer, and for a direction that, following such a finding being returned, the document effecting that transfer be delivered up for cancellation. This is plainly necessary, for an order can only be passed by a civil court in terms of a relief actually sought. Nothing in *Abdul Shukoor Saheb* militates against this, even de hors the 1976 amendment. Indeed, paragraph 31 is against Mr Narkar, for it specifically contemplated a suit being filed under Rule 63, but clarified that it would need to be brought in a representative capacity. There is nothing in these observations of the Supreme Court that say that a registered document of transfer or title can be deemed to have been declared void on the basis of an assertion made in an Affidavit in Reply without the person who made that assertion filing a proceeding seeking that relief. It is always possible for an attaching Creditor to argue in opposition to an application for raising attachment that a particular transaction is fraudulent. But when it is shown that there is an registered document of title effecting the transfer, merely saying it is fraudulent is not enough. There is an effect to registration under Section 17 of the Registration Act and this cannot be nullified on an argument in opposition. The person who seeks to invalidate the transfer must seek that relief, but he is required to do so in execution, not, any longer, by a separate suit. That is the only effect of the deletion of Rule 63 and the amendment of Rule 58. Mr Narkar cannot explain how that declaration of a fraudulent transfer and that direction for delivery of the document for cancellation can be granted to the Bank without there being a prayer for it anywhere in any application or proceeding.

7. In any case, it is not shown how such a transfer is invalid, let alone fraudulent. The only argument seems to be that the transferors and transferee of the flat entered into this arrangement only after the loan granted by the Bank to the principal debtor 'went bad'. But it is not shown that this transfer was in violation of any order of injunction, restraint or any order of Receivership. A loan remaining unpaid or overdue does not self-generate any injunction or restraint. The property in question was not charged to the Bank or given as security. The Bank has, simply put, done nothing at all ever to impeach the transaction.

8. What Mr Narkar's argument amounts to is this: if a loan 'goes bad', then there is automatically a charge created over any and every property of a borrower, and of the borrower's partners, including fractional interests, even if the loan in question is secured by other properties and assets, and even if the lender has not even initiated any recovery proceedings, let alone obtained any injunctive order.

9. The long and short of this is that the Bank seeks in execution to attach a property that does not belong to any of the principal debtors nor to any of the guarantors. It is not the property of any of the Award Debtors at all. The entire action of the Bank in attempting to attach this flat is wholly without basis.

10. The Chamber Summons is made absolute in terms of prayer clauses (b) and (c).

11. The request for a stay of this order is rejected. The Bank is unable to demonstrate even prima facie how that transfer is bad, and how it could have attached the entire flat in execution. The attachment is raised and released forthwith and all will act immediately on production of an authenticated copy of this order.

12. No costs.

(G. S. PATEL, J)